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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-28

GEORGE W. PICKETT, ET AL.,

Petitioners,

v.

EDWARD JOSEPH X. CHAPMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Edward Chapman respectfully requests this Court to deny the petition for writ of certiorari, seeking review of the judgment of the Seventh Circuit Court of Appeals in this case.

Respondent does not quarrel with any individual fact set forth in the petition. However, because the petition creates some confusion over two central points, the following brief additional statement is provided.

STATEMENT OF THE CASE

This litigation was commenced in 1973 as a result of respondent's 289 day confinement in punitive segregation for refusing on religious grounds to clean pork from food trays. From the outset, respondent's complaint alleged a violation of both his First and Eighth Amendment rights. (Petition 4; App. 35a, 36a, 45a-46a, 60a, 74a, 92a, 107a). The First Amendment claim was based solely on the impermissible reason for his punishment. The Eighth Amendment claim was based on the disproportion between the reason for and the length of his punishment.

Not only were distinct constitutional violations alleged, but the courts below found distinct First and Eighth Amendment

violations. In 1980, the district court concluded "that the plaintiff's First Amendment right to free exercise of religion was violated by his punishment for refusal to follow an order to handle pork" (App. 100a). The court therefore expunged the disciplinary action from the respondent's record and enjoined petitioners from any further use of such record (App. 100a). Because the court of appeals had previously ruled that "official immunity [was] available to the defendants as a defense to Chapman's First Amendment claim for monetary damages" (App. 52a), no monetary damages were awarded for the First Amendment violation.

The court of appeals also ruled, however, that "[a]lthough we have held that defendants enjoy a qualified immunity from monetary damages regarding Chapman's First Amendment claim, this does not extend to the Eighth Amendment violation" (App. 58a). The court recognized that the question of whether defendants "knew or should have known" that the length of Chapman's confinement in segregation "was or became grossly disproportionate to the offense with which he had been charged" (App. 58a-59a) required an inquiry different from that of whether defendants knew or should have known that the reason for placing Chapman in confinement - his refusal to clean pork off food trays -- violated a protected First Amendment right (App. 51a-52a).

This is a crucial distinction which is blurred by the petitioners' statement of the case and by the dissenting opinion below. The premise of the dissenting judge that "[t]his first amendment case has turned into an eighth amendment one because of the court's holding in 1978 that the defendants have qualified immunity from damages for punishing Chapman on account of his religious beliefs" (App. 15a (citation omitted)) is simply wrong. The court's ruling on First Amendment immunity does not control the Eighth Amendment immunity inquiry, and never has. This has always been an Eighth Amendment case, and the distinct questions of immunity under the two claims have always been considered as separate issues.

Therefore, the Eighth Amendment Harlow inquiry which is at issue here, and which the court below properly applied, asks what petitioners knew or should have known was an acceptable length of Chapman's punitive segregation in light of the nature of his offense. The question of whether petitioners knew or should have known that Chapman's refusal to touch pork was a constitutionally justifiable reason for his initial punishment is thus not relevant to the Eighth Amendment claim.

The second crucial point is that the issue raised in the petition was not raised in the district court below. One reason for petitioners' failure to raise it in the district court may have been that their own expert, Charles E. Fenton, who was an assistant warden at Marion penitentiary during Mr. Chapman's confinement in segregation (App. 78a), testified that "an inmate charged with refusal to work under the facts [of this case] would receive from three days to a week in segregation" (App. 78a). The district court judge found this testimony "especially credible" (id.) and held that Chapman's confinement became disproportionate after seven days, awarding him $7,000 in damages for 282 days of unlawful segregation (App. 82a).

The court of appeals noted in affirming the district court (App. 1a-15a, 126a), that "[defendants] did not advance a qualified immunity argument before the district court in this case" (App. 10a-11a n. 4). The court below added that a previous panel of the court of appeals correctly decided the immunity issue (id.)[1] and it cited additional authority to support that earlier ruling (id.).

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[1] As a pure housekeeping matter, the cite to the previous opinion in footnote four (App. 10a-11a n.4), American Intern. Ins. Co. v. Vessel SS Fortaleza, 585 F.2d 22, 28 (7th Cir. 1978), is incorrect. It should read: Chapman v. Pickett, 586 F.2d 22, 28 (7th Cir. 1978). The error is West Publishing Company's, not petitioners'.

REASONS FOR DENYING THE WRIT

I. Petitioners Waived The Qualified Immunity Issue By Not Presenting It In The Trial Court Below.

This Court has traditionally not reviewed issues that were not properly raised in the courts below. University of California Regents v. Bakke, 438 U.S. 265, 283 (1978); Trailmobile v. Whirls, 331 U.S. 40, 50 (1946); Hormel v. Helvering, 312 U.S. 552, 556 (1940). The immunity issue presented for review in the petition was never raised in the district court. Moreover, petitioner also failed to raise it in their first two briefs to the court of appeals below. After the case was fully briefed and set for oral argument, petitioners, hoping that they might be able to assert an absolute immunity defense, requested and received a postponement of oral argument until the Supreme Court decided Cleavinger v. Saxner, ___ U.S. ___, 106 S.Ct. 496 (1985). It was only after the Supreme Court's decision in Cleavinger foreclosed defendants' potential absolute immunity argument that petitioners raised a qualified immunity argument in a supplemental brief filed with the court of appeals. The issue was therefore waived and accordingly should not be considered by this Court.

The waiver rule protects both a party's right to "offer all the evidence they believe relevant to the issues" and the district court's function to hear and evaluate evidence and decide "issues which the trial tribunal is alone competent to decide." Hormel, 312 U.S. at 556. Application of this rule is particularly appropriate here because it is now well established that the Harlow v. Fitzgerald qualified immunity standard requires an objective, but nevertheless fact-specific inquiry. Anderson v. Creighton, No. 85-1520, slip op. at 6 (June 25, 1987); id. at 12 (Stevens, J., dissenting); Harlow, 475 U.S. 800, 818 (1982); id. at 821 (Brennan, J. concurring). Because the qualified immunity defense was not raised by the petitioners in the district court below, the respondent had no opportunity to formulate or to address that fact specific inquiry.

Moreover, should petitioners now be permitted to raise a qualified immunity defense, Mr. Chapman would clearly be prejudiced. Petitioners' own expert, who was Marion's assistant warden at the time of Chapman's confinement in punitive segregation, testified that three to seven days was the proper punishment for Mr. Chapman's refusal to clean trays containing pork. This testimony in itself provides convincing evidence that reasonable prison officials knew that 289 days in segregation was excessive punishment. However, had petitioners raised a qualified immunity defense, Mr. Fenton would undoubtedly have been asked what prison officials knew to be the law at that time. Such a question would have been quite revealing in light of the fact that at the time of the respondent's confinement in segregation, Marion prison officials had been defendants in Bryant v. Harris, 465 F.2d 365 (7th Cir. 1972), a case in which the Seventh Circuit held that Marion prisoners confined in indefinite segregation for religious reasons stated valid Eighth Amendment causes of action. Id. at 367. If Mr. Chapman had been put on notice of the qualified immunity defense, he could have made an appropriate record. Permitting the petitioner to raise the qualified immunity defense in the appellate courts without having raised it in the district court below would therefore deprive the respondent of his day in court on that issue.[2]

Because the issue raised by the petition was not raised in the district court, and was thereby not preserved for appeal, this Court should deny the writ.

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[2] The dissenting judge below would not have found a waiver of this issue because it was raised in 1978 (App. 17a). However, Harlow v. Fitzgerald was not decided until 1982. Petitioners' argument in this Court is that the court below missapplied the Harlow v. Fitzgerald standard. The argument that Harlow has been missapplied could only have been raised after the Harlow, decision, especially since the Harlow immunity analysis requires a "fact-specific" inquiry. See Anderson, slip op. at 6.

II. The Petition Raises a Narrow Factual Issue That The Court Below Correctly Resolved.

This case does not implicate a change or new interpretation of either qualified immunity or Eighth Amendment law. The court of appeals below considered and applied the proper qualified immunity analysis to the facts of this case. The Petition raises the narrow factual question of whether Marion prison officials should have known in 1972 that Chapman's confinement in segregation was disproportionate to his "offense" of refusal to work on religious grounds. This issue could never realistically recur and is too narrow to warrant review by this Court on certiorari. Thus, resolution of the question presented by the petition turns only on the facts of this case and is of interest only to these parties. For these reasons, certiorari should be denied.

Moreover a petition in 1987 regarding application of a standard announced in 1982 to facts which occurred in 1972 does not offer the timeliness, importance, and clarity of issues necessary for this Court to exercise its discretionary review. Certainly the great evolution in the law of prisoners' rights since 1972 makes it extremely unlikely that prison officials could find meaningful guidance in this Court's substantive determination of what law was or was not established in 1972.

Not only is the issue raised by the petitioner a narrow factual one, but also it is one that was rightly decided by the two court of appeals panels and one district court judge who have considered it. In 1978, the Seventh Circuit affirmed (App. 58a-59a) the district court's ruling (App. 123a-124a) that petitioners were not entitled to the defense of qualified official immunity on the Eighth Amendment claim. The court correctly applied the objective "knew or should have known" standard, holding that petitioners "should have known that the punishment was grossly excessive" (App. 59a). This conclusion is supported by the existing case law, by Mr. Fenton's testimony, and by documents written by the defendants at the time of the respondent's confinement in segregation. (See, e.g., App. 8a).

In its opinion below, the court of appeals addressed the issue of the application of the doctrine of qualified immunity to the facts of this case, responding primarily to the arguments raised in Judge Easterbrook's dissent. After noting that defendants "did not advance a qualified immunity argument in the district court in this case" (App. 10a-11a n. 4),[3] the court reviewed its 1978 opinion and concluded that Harlow v. Fitzgerald did not change the 1978 result (Id.).[4] The court did, however, further particularize the legal basis of the Eighth Amendment right at issue in 1972. The court stated: "In 1972 it was established that excessive punishment in segregated confinement for the exercise of a religious right could subject prison officials to liability. See Bryant v. Harris, 465 F.2d 365, 367 (7th Cir. 1972)" (App. 10a-11a n. 4). In both of these opinions, the court of appeals applied the qualified immunity standard in exactly the way that the petition proposes, considering whether "petitioners reasonably could have known that their actions violated [the] general legal principle" of disproportionate punishment." (Petition at I).

Because this narrow factual question has been correctly resolved below three times, and because its reconsideration yet a fourth time will have no impact on any case other than this one, certiorari should be denied.

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[3] The rule that issues not raised in the district court are waived on appeal is well established in the Seventh Circuit. Devalk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 338 (7th Cir. 1987); Shlay v. Montgomery, 802 F.2d 918, 921 (7th Cir. 1986); United States v. Kennedy, 797 F.2d 540, 544 (7th Cir. 1986), cert. denied, 107 S. Ct. 575 (1986); Erff v. Markhon Industries, 781 F.2d 613, 618 (7th Cir. 1986) ("[I]t is axiomatic that arguments not raised below are waived on appeal").

[4] In 1978, at the time of the court of appeals first Eighth Amendment immunity ruling, the qualified official immunity test was two-pronged: an objective "knew or should have known" standard and a subjective "malicious intent" standard (App. 50a). Immunity could be defeated under either prong (Id.). However, since "malicious intent" was not alleged, the court of appeals applied only the first, objective prong. Therefore, the Supreme Court's opinion in Harlow v. Fitzgerald, 457 U.S. 800 (1982), eliminating the subjective prong of the test id. at 815-18, did not affect the correctness of the 1978 result.

III. The Decision Below Is Consistent With This Court's Recent Decision In Anderson v. Creighton.

In Anderson v. Creighton, No. 85-1520 (June 25, 1987), this Court concluded that for a right to be clearly established under the Harlow standard, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent" (slip. op. at 4-5 (citations omitted)). Three times courts below have found that the petitioners knew or should have known that their conduct violated the respondent's Eighth Amendment rights. In light of the well-known Eighth Amendment standard outlawing grossly disproportionate punishment of prisoners, Weems v. United States, 217 U.S. 349 (1910), the record below leaves no doubt as to the apparent unlawfulness of petitioners' punitive segregation of Chapman for 289 days because of his sincere, religiously motivated refusal to handle pork.

The district court judge below found that "the adjustment committee was fully aware that Mr. Chapman's refusal to work was based on a sincerely held religious belief." (App. 77a). The district court also found that Mr. Chapman was allowed to remain in general population for two days following his refusal to work, during which time he worked, without incident, alongside the guard who cited him for the infraction (App. 77a, 77b). Then, despite the trivial nature of the disciplinary violation, and despite the fact that he was permitted to work in general population without incident for two days following the incident, he was punished with 289 days in punitive segregation, a punishment which the district court found, after hearing the evidence, involved significant deprivations (App. 79a, 79b). Moreover, the experts who testified concerning the issue of when the punishment became disproportionate, one of whom was an assistant warden at

Marion when Mr. Chapman was punished, agreed that 289 days for refusal to work was grossly excessive (App. 78a).

Finally, the court of appeals below, found particularization of the Eighth Amendment right in Bryant v. Harris, 465 F.2d 365, 367 (7th Cir. 1972), a case decided before Mr. Chapman was placed in segregation and which the court of appeals below found stood for the proposition that "excessive punishment in segregated confinement for the exercise of a religious right could subject prison officials to liability." (App. 10a-11a n.4). Thus, the courts below correctly applied the Harlow standard, both as it is set forth in Harlow and as it is interpreted in Anderson. All three courts to consider the issue applied the objective, not subjective, prong of the test. (See 123a-124a, 59a, 10a-11a n. 4).

This is thus clearly not a case in which prison officials made an inevitable, yet reasonable mistake. Compare Anderson, slip. op. at 5. While it is true that at that time no reported case had addressed the very action in question -- nine months of segregation for a religiously motivated refusal to touch pork -- such specificity is not required. Given the obvious outrageousness of petitioners' vindictive conduct, given the unanimity of the courts below which have considered the issue and given the opinions of the expert witnesses. Id. at 4-5, it is clear that under the preexisting standards of Weems and Bryant, the unlawfulness of petitioners conduct is "apparent." Anderson, at 5.

Because the courts below have decided the qualified immunity issue consistently with the dictates of Anderson, this Court should deny the writ.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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